

Internal Revenue Service  
**memorandum**

CC:TL:Br3  
FJElward

date: NOV 21 1986

to: District Counsel, Chicago CC:CHI

from: Director, Tax Litigation Division CC:TL

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subject:

Technical Advice

Your memorandum of October 3, 1986, requested technical advice on the refundability of an overpayment in the above-case.

ISSUE

Does I.R.C. section 6512(b)(2) preclude a refund of the overpayment by the petitioner.

CONCLUSION

The overpayment cannot be refunded due to the limitations on refunds imposed by I.R.C. section 6512(a) and (b) since none of the conditions listed in section 6512(b)(2) have been satisfied.

FACTS

During taxable year [REDACTED], [REDACTED], the taxpayer, had \$[REDACTED] withheld by her employer. On [REDACTED] she filed an Application for Automatic Extension of Time to File United States Individual Income Tax Return and made an estimated payment of \$[REDACTED]. She did not file a return during the four month extension that expired [REDACTED]. A notice of deficiency was mailed to her on [REDACTED]. She petitioned the Tax Court on [REDACTED]. In [REDACTED], she filed a return that claimed a refund. She gave the return to the appeals officer handling her Tax Court case.

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ANALYSIS

After the Service sends a notice of deficiency with respect to income tax for a given year and a timely petition is filed with the Tax Court, I.R.C. section 6512(a) prohibits any refunds of tax for that year except under stated conditions. Of the stated conditions the two closest to the present case are 6512(a)(1), overpayments determined by the Tax Court in a decision which has become final, and (2), amounts collected in excess of the amount computed in accordance with the Tax Court decision which has become final. Refunds of any overpayment determined by the Tax Court are specifically limited by I.R.C. section 6512(b)(2). The three circumstances described by the last mentioned subsection are (A) payments made after the mailing of the notice of deficiency, (B) amounts which would have been refundable if a timely claim had been filed on the date on which the notice of deficiency was mailed, and (C) certain claims filed before the notice of deficiency was mailed.

In the present case, subsections A and C of section 6512(b)(2) are not applicable since the tax was not paid after the mailing of the notice and no claim was filed before the mailing of the notice. Therefore, the Tax Court has jurisdiction to determine an overpayment in this case only if the limitations specified in subsection B are met. The subsection provides:

(2) Limit on amount of credit or refund.- No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid-

(A) ...

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) ...

Of the section 6511 periods mentioned immediately above, only section (b)(2) could be applicable. This section provides:

(2) Limit on amount of credit or refund.-

(A) Limit where claim filed within 3-year period. If the claim was filed by the taxpayer during the 3-period prescribed in subsection (a), the amount of the credit or refund shall not exceed

the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. ...

(B) Limit where claim not filed within 3-year period. If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

The three year period mentioned in section 6511(a) is the one applicable when a claim is filed "within three years from the time the return was filed." The two year period mentioned in section 6511(a) is a period starting with the payment of the tax.

In the present case, on the date the notice of deficiency was issued (i.e. the date of the deemed claim under section 6512(b)(2)(B)), no return had been filed by the taxpayer. Therefore, any claim filed on the date the notice was sent would be subject to the two year rule of section 6511(a) and (b) unless the "deemed claim" was also a "deemed return". Since section 6512 uses the word claim and not return, it cannot, in our view, be broadened by interpreting the word claim to mean return. It is clear that a return may also be a claim, but not every claim is or need be a return. 1/

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1/ Revenue Ruling 76-511, 1976-2 C.B. 428 and Revenue Ruling 78-343, 1978-2 C.B. 326 (mentioned in your memorandum) do not deal with the "deemed" claims under section 6512(b)(2)(B). They represent interpretations of section 6511 and whether a normal return, filed delinquentlly, starts the three year period. We see no inconsistency between the revenue rulings and our holding in this technical advice.

Parenthetically, we agree with you that Henderson v. I.R.S., 36 AFTR 2d 75-5647 (E.D. Mich. 1975) may be read as inconsistent with these revenue rulings. We disagree with the dictum in Henderson as to the exclusivity of the two-year rule specified in section 6511(a) when no return is filed within two years of when the tax was paid. In the sole context of section 6511, a return filed within the three years (plus extensions) of when the return was due would be timely and the withholding could have been recovered. In Henderson, since no return was filed within this period (or any other period) the Court's ruling as to the application of the exclusivity of the two year rule is not precedential. In any event, Henderson, also had no occasion to consider section 6512(b), which controls the instant case.

Congress certainly understood this long-standing distinction when it wrote section 6512.

In Hollie v. Commissioner, 73 T.C. 1198 (1984), one of the issues was the jurisdiction of the Tax Court to determine an overpayment in a case very similar to the instant one. As here, the court had to interpret the ambit of section 6512(b)(2)(B). It held that where no return had been filed the two year period of section 6511(a) and (b) applied rather than the three year period. Id. at page 1207. Even though at the time the notice was issued, the taxpayer could have filed a timely "claim-return", the court held that the two year period applied as to the deemed claim. We recognize that the court did not discuss the possibility of a "claim-return", but also believe that if section 6512(b) permitted the deemed filed claim to be a deemed return, the court would have dealt with this and found that it had jurisdiction since the deemed claim was within the three year period. The court specifically found no return, while at the same time discussing a deemed claim, thus implicitly rejecting the concept of a "deemed" return.

The fact that an actual return was filed by the taxpayer after the notice of deficiency but within three years (plus extension) of the time the tax was paid, does not change this result. Although such a return and claim might be effective to utilize the three years period based upon the return in the context of section 6511 (as in Rev. Rul. 76-511, supra), the pertinent section here is section 6512. Section 6512(b)(2)(B), in essence "freezes" consideration at the time the notice of deficiency was issued, since clearly the claim which is relevant is the deemed claim only. The reference in section 6511(b)(2)(A) and section 6511(a) to claims filed "within a three years from the time the return was filed," is to claims filed on or after a filed return. The deemed claim here was filed before any return and therefore is not such a claim enjoying the three year period under the terms of sections 6511(a) and 6511(b)(2)(A). Consequently, a return must be filed before the notice of deficiency for the three year period to be applicable to the deemed claim of section 6512(b)(2)(B).


In sum, absent the limitation contained in section 6512(b)(2), a refund of the overpayment made by [REDACTED] could have been made since her return-claim was timely under section 6511(a) and not subject to the limitation on amount contained in section 6511(b); however due to the limitation

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contained in section 6512(b)(2), the Tax Court has no authority to allow an overpayment and thus no refund of the overpayment may be made to [REDACTED].

ROBERT P. RUWE  
Director

By:

  
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